Supreme Court, U. S.
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No. 80-1061

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

JOHN WATERS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Question Presented

Whether the lower evidentiary standard adopted by the Second Circuit in determining the admissibility of coconspirator hearsay declarations, *viz.* whether defendant's conspiratorial involvement has been proven by a "fair preponderance" of the independent nonhearsay evidence, is the proper test to be applied in light of the more stringent evidentiary standard applied by the First, Fifth, Eighth, Ninth and Tenth Circuits, *viz.* coconspirator hearsay declarations are admissible only if the independent nonhearsay evidence, standing alone, would support a jury finding of defendant's involvement in the conspiracy.

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JOHN WATERS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner John Waters respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

Opinion Below

The opinion of the Court of Appeals (Kaufman, Kearse and Bright, JJ.) (Appendix, *infra*) is not reported.

Jurisdiction

The judgment of the Court of Appeals was entered on October 28, 1980 (Appendix, *infra*). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and Rule 20.1 of the Rules of this Court.

Constitutional Provisions and Rules Involved

Constitutional Provision:

The Sixth Amendment to the United States Constitution:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Rule:

Rule 801(d) (2) (E) of the Federal Rules of Evidence:

> A statement is not hearsay if . . . [t]he statement is offered against a party and is . . . a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

Statement of the Case

Petitioner was convicted after a jury trial before the United States District Court for the Southern District of New York (Gagliardi, J.) of conspiracy to possess and distribute narcotics and possession with intent to distribute narcotics, in violation of 21 U.S.C. §§ 841 and 846. Petitioner was sentenced to a term of eight years' imprisonment, to be followed by a special parole term of ten years on the substantive count. The conviction was affirmed by the United States Court of Appeals for the Second Circuit.

Indictment 80 Cr. 72, filed in the Southern District of New York on February 7, 1980, charged five individuals, among them John Waters, with conspiracy to violate the federal narcotics laws and with various individual substantive narcotics offenses. Count One charged all five defendants with conspiracy to distribute during the period beginning May 1, 1979 up to and including February 7, 1980. Count Four charged defendant Waters with possession of heroin with intent to distribute it on January 11, 1980.

While Waters is named generally in the preamble to Count One as one of the alleged members of the overall conspiracy, the only overt act in which he is named is Paragraph 11, in which he is alleged to have met with the other defendants to sell one-eighth kilogram of heroin on one occasion (January 11, 1980). Similarly, in Count Four, the only substantive count in which he is named, Waters is charged with possession of heroin involving the one transaction on January 11, 1980. Waters was not charged with involvement in any other narcotics related transactions except the single incident occurring on January 11, 1980.

The investigation which culminated in the instant indictment commenced in May 1979 when George Williams, a Special Agent of the Drug Enforcement Administration acting in his undercover capacity, met with codefendants Archie Phillips and Natalie Rice for the ostensible purpose of arranging introductions for Williams to people in the drug business to whom he could sell quinine and mannite (pharmacologic cutting agents for narcotics). Agent Williams had previously worked with Phillips, with Williams providing the "cut" and Phillips supplying the introductions to narcotics sellers.

Phillips, a low level street dealer, provided Williams an introduction to Natalie Rice and the three met early in May 1979 to discuss the possibility of Williams arranging

the sale of large quantities of quinine. At these conversations, Rice and Phillips are purported to have said that "the man at the Garage" was someone who had been interested in purchasing quinine. Phillips later referred to the "man at the Garage" as "Sugar."

In subsequent discussions over the first half of May 1979, Special Agent Williams attempted to negotiate with Rice and Phillips the sale of large quantities of quinine and mannite as well as the purchase of heroin. Throughout these various negotiations, Rice and Phillips referred to "the man at the Garage" and "Sugar" as a large scale dealer in heroin who would be wanting the quinine and mannite. However, they wouldn't identify him or allow Agent Williams to deal with him directly. Ultimately, however, these negotiations came to naught and no narcotics transactions were ever consummated in May 1979. Nothing more was seen or heard about "the man in the Garage" or "Sugar."

In early January 1980, after a hiatus of nearly six months, Agent Williams accidentally ran across codefendant George Brantley, whom he had earlier met before at Rice's apartment in the Summer of 1979. The two men discussed a potential transaction for a quantity of pure heroin. After several later telephone conversations with Brantley and Rice, the terms of the transaction were set—⅛ kilogram of pure heroin to be sold to Agent Williams for 50 pounds of quinine and $70,000. The transaction was to be consummated on January 10 or 11, 1980.

On the morning of January 11, 1980, Agent Williams, accompanied by undercover agents Robert Baker and Lorraine Coleman arrived at the Rice apartment on West 123rd Street at approximatly 12:10 p.m. Upon their arrival, Agents Coleman and Williams entered Rice's apartment, where they met Rice, Brantley and Deborah Smith, a friend of Ms. Rice. After exiting the apartment to retrieve the quinine from Agent Baker, who remained in

the car, Agent Williams saw defendant Waters for the first time—standing on the curb near Ms. Smith's car.* As he retrieved the quinine, Agent Williams saw Waters enter the building.

Upon returning to the building, Agent Williams was met in the hallway by defendant Brantley, who directed him to place the quinine in the bathroom in the first floor hallway, outside Ms. Rice's apartment. The quinine was placed in the bathtub and after he exited the bathroom, Brantley placed a padlock on the bathroom door. After some further negotiations in the hallway and outside the building concerning the mechanics of exchanging the money for the drugs, Agents Williams and Coleman returned to the Rice apartment with the money in a shoulder bag.

Inside the Rice apartment on this occasion were Brantley, Rice and, for the first time, Waters. Upon Williams, Baker and Coleman entering the apartment, Waters was immediately asked to leave by Brantley and the two of them proceeded outside to the hallway where they were joined by Ms. Smith. At this juncture, with Waters outside in the hallway, Brantley and Rice began counting the money the agents had brought and they started to haggle over how the drug transfer was to be accomplished. Brantley took the money initially and was stopped by Agent Baker who wasn't about to let him leave the apartment with it. Eventually, it was agreed that Agent Coleman would go with Ms. Rice down to the street to pick up the package. Thereupon, Rice, accompanied by Agents Coleman and Baker left the apartment to retrieve the package while Agent Williams remained with Brantley.

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* During the entire period of the conspiracy (May 1979 to January 1980), the agents had never met defendant Waters and had no idea as to his identity when he was initially seen in front of Rice's apartment building that morning, in the company of Deborah Smith.

In the interim, while waiting for the trio to return, Agent Williams and Brantley went out into the hallway, where Williams observed that the bathroom door was ajar with someone obviously inside. They subsequently returned to the apartment to await their companions' return. Within about five minutes thereafter, the trio returned and upon a prearranged signal, the three agents arrested Rice and Brantley.

Thereupon, after securing their arrests, Agent Williams looked inside the bathroom and discovered Waters with his pants open and the commode down. The quinine was also observed to be in the bathtub where it had originally been placed (the blanket under which it originally had been placed was slightly ajar) and a brown paper bag was also observed on the floor several feet from Waters. The brown paper bag was subsequently found to contain heroin. Waters was immediately placed under arrest.

After arrest, Waters stated, in the course of debriefing, that while he was admittedly the owner of the PFP Garage, located at 275 St. Nicholas Avenue, and had the nickname "Sugar",* he had no knowledge or involvement in the narcotics transaction in the Rice apartment, having been present only by virtue of having accompanied his girlfriend, Debby Smith, who was there to visit Natalie Rice. Waters' statement was supported by defendant Brantley, who, in his post-arrest statement to an Assistant United States Attorney, stated, *inter alia,* that Waters had not been involved in any deals with him — exonerating Waters of any involvement in the morning's transaction.

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* Significantly, on cross-examination of the agents, it developed that there were other suspected narcotics dealers known to them in the neighborhood who had the nickname "Sugar" including one such individual (nicknamed "Brown Sugar") living in the Rice apartment building and with whom they had earlier had negotiations in an unrelated transaction.

REASONS FOR GRANTING THE WRIT

The Second Circuit's "fair preponderance" test for independent nonhearsay corroboration of defendant's conspiratorial involvement is an impermissibly less stringent standard than the "prima facie" test adopted by five other circuits.

In analyzing the miniscule quantum of proof of Petitioner's direct involvement in the activities of the other defendants—predicated primarily upon his fortuitous presence in a bathroom where the drugs happened to have been secreted—several additional factors require consideration in scrutinizing the significance *vel non* of his accidental presence in a place where a narcotics transaction was transpiring without any direct personal involvement on his part in the transaction.

The only evidence to tie him either to the conspiracy or the substantive offense was his brief presence in the Rice apartment as well as his later and thoroughly ambiguous proximity to the narcotics in the bathroom where he was found with his pants open and the commode down. No discussion of narcotics is alleged to have occurred in his presence and, indeed, he was asked to leave the Rice apartment shortly before a narcotics transaction was about to transpire. Thus, Petitioner's mere presence, without more, is hardly enough to link him to the conspiracy or transaction that occurred in the Rice apartment. See, e.g., *United States* v. *Di Re,* 332 U.S. 581, 593 (1947); *United States* v. *Cirillo,* 499 F.2d 872, 884 (2d Cir. 1974); *United States* v. *Terrell,* 474 F.2d 872, 875 (2d Cir. 1973); *United States* v. *Fantuzzi,* 463 F.2d 683, 690 (2d Cir. 1972); *United States* v. *Steward,* 451 F.2d 1203, 1206 (2d Cir. 1971); *United States* v. *Garguilo,* 310 F.2d 249, 253 (2d Cir. 1962).

Moreover, even when viewed in the light most favorable to the Government (*Glasser* v. *United States,* 315 U.S. 60 (1942)), the independent nonhearsay evidence corroborating Petitioner's involvement in the conspiracy proper (both direct and circumstantial) was exceedingly tenuous, at best. Shorn of the coconspirator declarations of defendants Brantley, Rice and Phillips as to the source of supply being "the man in the Garage" or "Sugar", the entirety of the independent nonhearsay evidence of Petitioner's involvement in the conspiracy consisted principally of Petitioner's ambiguous presence in Rice's apartment and the hallway bathroom on the morning of January 11, 1980.*

The District Court, however, found that under the Second Circuit's standard for measuring the necessary quantum of independent nonhearsay evidence of defendant's conspiratorial involvement prior to permitting the jury to consider coconspirator declarations against him (FRE Rule 801(d)(2)(E)), Petitioner's participation had been established by that "fair preponderance" of the independent nonhearsay evidence required in the Second Circuit. In so doing, the District Court followed the applicable standard delineated in *United States* v. *Geaney,* 417 F.2d 1116 (2d Cir. 1969):

> "[T]he judge must determine, when all the evidence is in, whether in his view the prosecution has proved participation in the conspiracy, by the defendant against whom the hearsay is offered, by a fair preponderance of the evidence independent of the hearsay

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* As the Government agents testified, when they saw Petitioner outside Rice's apartment on the morning of January 11, they didn't even know who he was, having never seen him before over the seven month course of their undercover operation. Moreover, absent the statements of Rice, Brantley and Phillips, the agents had no other independent evidence as to "Sugar" or "the man in the Garage" that otherwise linked him to Petitioner other than his mere presence on the morning of January 11.

> utterances. If it has, the utterances go to the jury for them to consider along with all the other evidence in determining whether they are convinced of defendant's guilt beyond a reasonable doubt. If it has not, the judge must instruct the jury to disregard the hearsay or, when this was so large a proportion of the proof as to render a cautionary instruction of doubtful utility . . . declare a mistrial if the defendant asks for it."

Id., 417 F.2d at 1120.

It is respectfully submitted, however, that the *Geaney* standard, which has been considered and rejected in five other circuits, is ripe for appropriate consideration by this Court, particularly in light of the fact that this Court has yet to resolve the apparent conflict impliedly created between *Geaney* and this Court's opinion in *United States* v. *Nixon,* 418 U.S. 683 (1974) regarding the appropriate quantum of independent nonhearsay evidence of defendant's conspiratorial involvement which must be introduced as a preliminary matter before coconspirator declarations may be admitted against a defendant.

In *United States* v. *Oliva,* 497 F.2d 130 (5th Cir. 1974), the Fifth Circuit, expressly rejecting *Geaney,* defined the appropriate test as being, "whether the government, by evidence independent of the hearsay declarations of a coconspirator, has established a prima facie case of the existence of a conspiracy and of the defendant's participation therein, that is whether the other evidence *aliunde* the hearsay would be sufficient to support a finding by the jury that the defendant was himself a conspirator." *Id.* at 132-133 & n. 3.

The *Oliva* test has been expressly adopted by the First, Eighth and Ninth Circuits. See, e.g., *United States* v. *Johnson,* 467 F.2d 804, 807 (1st Cir. 1972) (evidence "credible and sufficient to support the finding of concerted

action"); *Rizzo* v. *United States,* 304 F.2d 810, 826 (8th Cir. 1962) ("sufficient prima facie showing . . . *aliunde* of the declaration of an alleged co-conspirator"); *Carbo* v. *United States,* 314 F.2d 718, 737 (9th Cir. 1963) ("[T]he test is . . . whether, accepting the independent evidence as credible, the judge is satisfied that a prima facie case (one which would support a finding) has been made").*

Under the *Oliva* standard, then, coconspirator declarations may be placed before the jury if and only if there is a sufficient quantum of independent nonhearsay evidence pointing to defendant's conspiratorial involvement that would sustain the jury's finding of guilt wholly separate and apart from the coconspirator declarations sought to be placed before the jury. *Id.* 497 F.2d at 132-133.

The Second Circuit has expressly rejected this higher standard embraced by five other circuits, opting instead for a less stringent test that requires merely that there be a "fair preponderance" of independent nonhearsay evidence suggesting defendant's conspiratorial involvement. *United States* v. *Stanchich,* 550 F.2d 1294, 1299 (2d Cir. 1977); *United States* v. *Geaney,* 416 F.2d at 1120.

Indeed, substantial language in this Court's opinion in *United States* v. *Nixon, supra,* strongly suggests that *Oliva* rather than *Geaney* sets out the appropriate evidentiary standard in this area. As this Court noted in *Nixon,* "[a]s a preliminary matter, there must be substantial, independent evidence of the conspiracy, at least enough to take the question to the jury (citations omitted). Whether the standard has been satisfied is a question of admissibility

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* The Tenth Circuit applies a test which appears similar to the prima facie showing test. That court conditions the admissibility of co-conspirator hearsay upon "proof of circumstances from which the existence of the conspiracy fairly may be inferred . . ." *Bartlett* v. *United States,* 166 F.2d 920, 925 (10th Cir. 1948).

to be decided by the trial judge." *Id.* 418 U.S. at 701 & n.14.

The disparity created between *Geaney* and the *Oliva-Nixon* line of cases is substantial, particularly with regard to disposition of the instant case. In *Oliva,* on facts virtually identical with those of the case at bar, the Fifth Circuit found that the simple fact that telephone calls had been placed between defendant's and the narcotics seller's residences as well as defendant's mere presence in a parking lot at the time of an attempted sale was plainly insufficient independent nonhearsay corroboration of defendant's involvement in the conspiracy in the absence of proof that defendant and the seller had ever discussed the transaction or that defendant had ever actually supplied narcotics to the seller. On the basis of this paucity of independent nonhearsay proof, the Fifth Circuit reversed. *Id.* 497 F.2d at 134.

Similarly, in the case at bar, it is clear that the wholly ambiguous circumstances of Petitioner's mere presence at the Rice apartment—shorn of the coconspirator declarations relating to the "man in the Garage" and "Sugar"—was a plainly insufficient basis upon which to admit the mass of coconspirator statements of Rice, Brantley and Phillips.* Certainly, hearsay itself cannot be used to bootstrap itself into making the preliminary factual determination of whether there existed a sufficient independent nonhearsay basis for finding Petitioner's involvement in the instant conspiracy. *Cf. United States* v. *Cirillo, supra,* 499 F.2d at 885.

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* This case thus presents the classic fact pattern demonstrating nonhearsay evidence arguably sufficient under *Geaney* which is plainly insufficient under *Oliva* and *Nixon.*

Accordingly, certiorari should be granted to review this substantial and continuing disparity of standards among the circuits regarding admissibility of coconspirator declarations.*

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated: New York, New York
December 27, 1980

Respectfully submitted,

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* Moreover, review by this Court would appear to be singularly appropriate in light of the fact that the Second Circuit has expressly considered the *Oliva* line of cases, and the disparity created between them and *Geaney*, and has explicitly rejected any modification of the *Geaney* rule. See, e.g., *United States* v. *Stanchich*, 550 F.2d 1294, 1299 & n. 4 (2d Cir. 1977) (Friendly, J.). Indeed, the Second Circuit has also refused reconsideration of *Geaney* in light of *United States* v. *Nixon*, *supra*, dismissing the higher evidentiary standard impliedly suggested by this Court as "pure dictum . . . gratuitously offered." *United States* v. *Wiley*, 519 F.2d 1348, 1351 & n. 5 (2d Cir. 1975).

APPENDIX

Order of Court of Appeals.

UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-eighth day of October, one thousand nine hundred and eighty.

Present: HONORABLE IRVING R. KAUFMAN
HONORABLE AMALYA L. KEARSE
HONORABLE MYRON H. BRIGHT, sitting by designation,
Circuit Judges,

80-1304

UNITED STATES OF AMERICA,

Appellee,

v.

JOHN WATERS, a/k/a "Sugar",

Defendant-Appellant.

Appeal from the United States District Court for the Southern District of New York.

This case came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the judgment of said District Court be and it hereby is affirmed.

1. The district court's holding that appellant was a member of the conspiracy alleged in the indictment rested on "reasonable grounds," *see United States* v. *Geaney,* 417 F.2d 1116, 1120 (2d Cir. 1969), *cert. denied,* 397 U.S. 1028 (1970). Accordingly, the statements of appellant's alleged coconspirators were properly admitted, *see United States* v. *Geaney, supra.*

2. Viewed in the light most favorable to the Government, *Glasser* v. *United States,* 315 U.S. 60 (1942); *United States* v. *Barnes,* 604 F.2d 121 (2d Cir. 1979), *cert. denied,* 100 S.Ct. 1833 (1980), the evidence is more than sufficient to sustain appellant's conviction. *See United States* v. *Barnes, supra,* 604 F.2d at 158; *United States* v. *DeNoia,* 451 F.2d 979 (2d Cir. 1971).

3. The mandate shall issue forthwith.

IRVING R. KAUFMAN
AMALYA L. KEARSE
MYRON H. BRIGHT,
Circuit Judges.

No. 80-1061

FEB 27 1981
ALEXANDER L. STEVAS,
CLERK

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BRIEF FOR THE UNITED STATES IN OPPOSITION

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BRIEF FOR THE UNITED STATES IN OPPOSITION

QUESTION PRESENTED

Whether the district court erred in admitting co-conspirator statements against the petitioner.

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OPINION BELOW

The judgment order of the court of appeals (Pet. App. 1a-2a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 28, 1980. The petition was filed on December 26, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted of conspiracy to distribute and to possess heroin with intent to distribute it, in violation of 21 U.S.C. 846, and of possession of heroin with intent to distribute it, in violation of 21 U.S.C. 841(a)(1). He was sentenced to concurrent eight-year terms of imprisonment, to be followed by a ten-year special parole term.

1. In January 1979, DEA agent George Williams began operating as an undercover agent in New York City. Agent Williams posed as a recently discharged soldier with access to a supply of quinine and mannite, cutting agents used to dilute heroin. During the early spring of 1979, Williams met defendant Archie Phillips, a low-level drug dealer. Phillips agreed to introduce Williams to other area drug dealers who might be interested in purchasing quinine and mannite, and who would be willing to sell heroin to Williams (Tr. 33-37, 313-314, 387-388). On May 1, 1979, Phillips introduced Williams to defendant Natalie Rice, another drug dealer. At this meeting Phillips asked Rice whether "the guy at the garage" was interested in purchasing any quinine or mannite. Rice responded that she did not know, but that she would try to find out (Tr. 37-43, 76, 303-304, 328-329).

The following day, Agent Williams and Phillips again met with Rice, at which time Rice indicated that her man

"Sugar" wished to purchase a large quantity of quinine. Rice's telephone records show two prior calls to petitioner on that morning. Phillips later told Williams that "Sugar" was the same person earlier referred to as the "guy at the garage," and still other evidence established that the "garage" was the PFP Garage owned by petitioner. Phillips also stated that it might be possible to purchase heroin directly from "Sugar," who sold the drug at a cheaper price than that offered by other dealers. Evidence introduced at trial showed that petitioner was known by the nickname "Sugar" (Tr. 44-59; Gov't Exhs. 1, 1A, 1B, 28(a), 35A-35F).

On the evening of May 3, 1979, Agent Williams and Phillips met again, and Phillips stated that they were going to see his "man at the garage" concerning the sale of the quinine. Phillips directed Williams to the vicinity of petitioner's PFP Garage. Phillips entered the garage and subsequently returned, explaining that he had spoken with "Sugar's" brother concerning the purchase of heroin from "Sugar." Williams and Phillips agreed to speak again after the latter had contacted "Sugar" personally (Tr. 58-62, 75, 719; Gov't Exhs. 2, 2A, 2B, 30).

Williams spoke with Phillips and Rice on several occasions during the next few weeks. On May 18, Rice informed Williams that the "man at the garage" was definitely interested in purchasing some quinine, and she asked Williams not to sell it elsewhere. Rice's telephone records indicate that she had placed a call to petitioner that morning (Tr. 64-68, 80; Gov't Exhs. 4, 4A, 5, 5A, 28(a)(1)).

On May 30, 1979, Williams met with Rice, who informed him that "Sugar" had obtained quinine from another source. Rice's toll records show a lengthy call to petitioner, made earlier that day. At that same meeting, Rice agreed to take 15 to 25 pounds of quinine on consignment from Williams. Williams at this time expressed interest in purchasing some heroin. Thereafter, on June 2, 1979, and on

September 12, 1979, Agent Williams purchased one-eighth of a kilogram of heroin from Phillips, Rice and certain of their associates (Tr. 77-84, 88-90, 134-161, 174-179, 261-262, 377-378, 398-406, 416-422, 461-465, 503-520, 548; Gov't Exhs. 7, 7A, 28(a), 28(a)(1)).

In early January 1980, Williams made arrangements with Rice and defendant George Brantley for the purchase of an additional one-eighth kilogram of heroin. The price was set at $70,000 plus 50 pounds of quinine (Tr. 182-186, 273, 423-434, 465-473; Gov't Exhs. 19, 19A, 24, 24A). The deal was initially set for January 10, but was postponed. Rice and Brantley explained to Williams that the delay was caused by problems with a middleman. Petitioner's telephone records indicate that shortly before Rice and Brantley called Williams to explain the delay, brief calls were placed from petitioner's phone to Rice's apartment (Tr. 186-200, 270-271, 278, 334-337, 434-438; Gov't Exhs. 19, 19B, 21, 21A, 22, 22A, 24A, 29(a)). The drug transaction was rescheduled for January 11. Telephone records show another call from petitioner to Rice that morning, just after Agent Williams confirmed the deal with Rice by phone.

Agent Williams, accompanied by DEA Agents Baker and Coleman, arrived at Rice's apartment shortly after noon on January 11. Williams and Coleman entered the apartment, while Baker remained in his car with the money and quinine (Tr. 199-203, 337-343, 345-346, 355-356, 438-441, 444, 480-491, 587-590, 626-629, 673-676, 682-685, 690; Gov't Exhs. 22, 29(a)). Once inside the apartment, Agents Williams and Coleman met Rice, Brantley, and petitioner's girlfriend, Debbie Smith. Brantley and Smith left shortly after the agents' arrival and were observed, along with petitioner, outside the apartment (Tr. 203-205, 279-280, 357-359, 480-491, 590-591, 651-656; Gov't Exh. 30). Brantley and Smith returned to the apartment a short time later.

After discussing the mechanics of the transaction with Brantley, Williams left the apartment in order to retrieve the quinine from Agent Baker, who was still waiting outside. Williams at this time observed petitioner entering the apartment building. Williams brought the quinine inside the building, and, at Brantley's direction, he put the quinine in a bathtub in the hall bathroom. Williams covered the quinine with a blanket, and Brantley placed a lock on the bathroom door. Williams, who had used the bathroom on previous visits to the Rice apartment, had never known it to be locked before (Tr. 205-208, 344, 365-369, 476, 659-661, 679).

At this point Brantley instructed Williams to bring the $70,000 into the apartment. Williams refused, and Brantley called off the deal. As Agents Williams and Coleman were leaving the building, they met Agent Baker, who had since obtained permission from his superiors to bring the money inside. The three agents then returned to Rice's apartment. Before entering, Williams noticed that the bathrom door was still locked. The agents entered the apartment and found Rice, Brantley and petitioner inside (Tr. 208-210, 445-447, 595-597, 679-680).

Brantley said something, and he and petitioner left the apartment; Williams observed them talking in the hallway until the apartment door was closed. Brantley re-entered the apartment alone a few minutes later. Agent Baker and Brantley counted the $70,000 and then agreed that Rice and Agent Coleman would take the money and pick up the heroin (Tr. 210-212, 370-373, 447-451, 597-600, 656, 659). Rice directed Coleman to the immediate vicinity of petitioner's garage. The deal was aborted, however, when Coleman refused to pay the $70,000 before seeing the heroin (Tr. 212-213, 451-453, 600-605, 680-681, 714-718).

While Rice and Coleman were gone, Brantley told Williams that the two women only had to go up the street to the garage to get the heroin. Brantley and Williams went into the hallway outside Rice's apartment to await the delivery of the heroin, and Williams noticed that the bathroom door was ajar. Noting Williams' observation, Brantley indicated that he would check on the quinine. Brantley held a brief, whispered conversation with someone in the bathroom, and then he pulled the bathroom door closed (Tr. 213-216).

Upon her return to the apartment, Agent Coleman gave an arrest signal, and waiting agents arrested Brantley and Rice. Agent Williams observed petitioner looking out of the bathroom door. Williams and Agent Baker opened the door and discovered petitioner standing within two feet of a brown paper bag containing 110 grams of high quality heroin. The quinine was still in the bathtub, but the blanket covering it had been disturbed. Petitioner was arrested.

ARGUMENT

Petitioner contends (Pet. 7-12) that the nonhearsay evidence of his participation in the drug conspiracy was insufficient to permit the admission against him of co-conspirator statements describing the source of the heroin as "Sugar" and "the man in the garage." Arguing that there is a conflict among the courts of appeals on the proper standard regarding the admissibility of such statements,[1] petitioner

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[1]Petitioner erroneously claims (Pet. 7, 10-11) that five courts of appeals have rejected the "fair preponderance standard" for a more stringent "prima facie" test. To the contrary, the First, Eighth, and Tenth Circuits have in fact adopted the "preponderance" test, while the Fifth Circuit has endorsed a "substantial evidence" standard. See *United States* v. *Petrozziello*, 548 F. 2d 20, 23 (1st Cir. 1977); *United States* v. *Bell*, 573 F. 2d 1040, 1043-1045 (8th Cir. 1978); *United States* v. *Andrews*, 585 F. 2d 961, 964-967 (10th Cir. 1978); *United States* v.

challenges the threshold "fair preponderance of the evidence" test endorsed by the Second Circuit in *United States* v. *Geaney*, 417 F. 2d 1116, 1120 (1969), cert. denied, 397 U.S. 1028 (1970), and applied by the district court in this case. But, as we have frequently stated in our briefs in opposition to similar petitions for a writ of certiorari, it is doubtful whether the slight verbal variations among the courts of appeals on this point will ever produce different results. See, *e.g.*, *Guzman* v. *United States*, cert. denied, 444 U.S. 898 (1979); *James* v. *United States*, cert. denied, 442 U.S. 917 (1979); *Macklin* v. *United States*, cert. denied, 439 U.S. 852 (1978). Furthermore, even assuming that the "prima facie" test advocated by petitioner is more stringent than the preponderance standard applied in this case (but see note 1, *supra*), review is unwarranted since the independent evidence of petitioner's participation in the conspiracy adduced at trial is overwhelming. Accordingly, the challenged co-conspirator declarations would have been admissible against petitioner under any standard, including the "prima facie" test.

Indeed, that evidence shows that petitioner regularly placed calls to or received calls from Rice on the dates and at the times when heroin or other drug-related transactions with Rice's source were being negotiated. During May 1979, when Rice informed Agent Williams that she would speak or had spoken to "the guy at the garage," telephone

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James, 590 F. 2d 575 (5th Cir.), cert. denied, 442 U.S. 917 (1979). Moreover, in adopting these standards, the court of appeals have generally indicated that they were rejecting the "prima facie" standard because it is less stringent. See *United States* v. *Petrozziello*, *supra*, 548 F. 2d at 23; *United States* v. *Andrews*, *supra*, 585 F. 2d at 966; *United States* v. *James*, *supra*, 590 F. 2d at 580-581. Likewise, the Ninth Circuit, in reaffirming its acceptance of the "prima facie" rule, declined to adopt the more "stringent" preponderance test. *United States* v. *Testa*, 548 F. 2d 847, 853 (9th Cir. 1977). But cf. *United States* v. *Stanchich*, 550 F. 2d 1294, 1299 & n.4 (2d Cir. 1977).

calls were placed from Rice's telephone to petitioner's home telephone. On the evening of January 10, 1980, when the transaction for one-eighth of a kilogram of heroin was originally scheduled to take place, two telephone calls were placed from petitioner's telephone to Rice's apartment. These two calls were placed at a time when Rice and Brantley were in almost continuous contact with Agents Baker and Williams, and when Rice and Brantley themselves were waiting for information about the timing of the transactions. Similarly, on January 11, 1980, the date of the actual transaction, another telephone call was placed from petitioner's telephone to Rice's telephone, shortly after the time set for Agent Williams to confirm the deal. In the context of the negotiations then taking place between Phillips, Rice, Brantley, and Agents Baker and Williams, these telephone calls provided strong independent evidence of petitioner's involvement in the conspiracy.

In addition, the district court correctly concluded that petitioner's activities on January 11, 1980, at Rice's apartment supplied further substantial nonhearsay proof of his involvement in the conspiracy. Petitioner was first seen in the vicinity of Rice's apartment on that day when the agents arrived to consummate the heroin purchase. He was next seen inside Rice's apartment speaking with Rice and Brantley when the agents returned unexpectedly to resume negotiations after they had broken down. Petitioner, consistent with an intent to insulate his involvement in the deal, left the Rice apartment with Brantley following the agents' return.[2] A short time later, Brantley, who was orchestrating the mechanics of the drug deal and who had just informed Agent Williams that he was going to check on the quinine,

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[2]Although petitioner asserts that he left the apartment after being asked to leave (Pet. 5), the testimony is clear that Brantley and petitioner spoke briefly and inaudibly, at which time Brantley simply excused himself and petitioner (Tr. 210, 371-372, 447-448, 597).

spoke with petitioner in the hallway bathroom where the quinine had been placed under padlock for safekeeping. Finally, of course, petitioner was arrested inside the previously locked bathroom with the heroin at his feet.

In light of all these circumstances—the telephone calls, the security measures, the whispered conversations, and the presence of petitioner and the heroin in the previously locked bathroom—petitioner's participation in the conspiracy was more than adequately established for the purpose of allowing the introduction of the various co-conspirator statements.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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